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HOM v. HOP

HIGH COURT MALAYA, KUALA LUMPUR
EVROL MARIETTE PETERS J
[ORIGINATING SUMMONS NO: WA-24F-338-11-2023]
24 MAY 2024

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Abstract – *Although grandparents could play significant roles in their grandchildren's life, their roles should not supplant those of the parents. The decision-making rights of the parents regarding their children ought to be respected. Therefore, an application by a grandmother for joint guardianship and custody of her granddaughter, alongside her father, should not be allowed unless it could be shown that the welfare and stability of the granddaughter dictated such application be allowed.*

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FAMILY LAW: *Custody – Care and control – Children placed under sole guardianship and custody of father after death of mother – Application by maternal grandmother for joint guardianship, custody, care and control of children alongside father – Whether application ought to be allowed – Whether deceased mother had appointed guardian for children – Whether father unfit as parent for children – Whether taking into consideration of ongoing legal disputes between parties, welfare and stability of children dictated maternal grandmother be given access to children*

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The plaintiff was the maternal grandmother of the child ('HAY'), while the defendant was the father of HAY. Following the mother's death, HAY was placed under the sole guardianship and custody of the defendant. After the death of HAY's maternal grandfather, HAY was made the sole beneficiary of the deceased mother's and grandfather's assets. The defendant and HAY filed an application against the plaintiff and the plaintiff's son ('uncle') for an accounting of the deceased mother's assets ('Suit No. 1091'). The plaintiff filed the present application requesting for joint guardianship, custody, care and control of HAY alongside the defendant. In determining the primary issue of whether the plaintiff as the maternal grandmother of HAY ought to be granted, among others, joint guardianship and custody of HAY, the further issues that arose were: (i) whether the deceased mother had appointed a guardian for HAY; (ii) whether the defendant was unfit as a parent for HAY; and (iii) whether, taking into consideration the ongoing legal dispute between the said parties, welfare and stability of HAY dictated that the plaintiff be given access to HAY.

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Held (dismissing application with costs):

(1) The deceased had never appointed a joint guardian to act alongside the defendant. In fact, a previous court order, obtained by the uncle, explicitly recognised the defendant as the sole guardian of HAY. The court order clarified that the defendant was entrusted with the exclusive

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rights and responsibilities of guardianship over HAY, without the involvement of any co-guardian. This prior legal determination underscored the defendant's sole authority over decisions regarding HAY's welfare, care and upbringing, thereby reinforcing the legal basis for the defendant's current guardianship status. (para 12)

(2) There was no evidence that the defendant was an unfit parent. Instead, the evidence demonstrated that the defendant had always been actively involved in HAY's life. The records showed consistent care and engagement from the defendant, reinforcing his capability as a responsible parent. (para 22)

(3) Although it was acknowledged that HAY had spent time with her grandparents, this arrangement occurred with the defendant's consent. The defendant had not objected to these visits, particularly because HAY's late grandfather was very fond of HAY. There was no evidence to suggest that the plaintiff and her family had taken on a substitute parental role. It would be inequitable to hold the defendant's decision, to permit HAY to spend time with her grandparents, against him. The decision was made of consideration for HAY's relationship with her deceased's grandfather, and not as an abdication of parental responsibility. It was clear that the defendant had maintained his primary role in HAY's upbringing and had not relinquished his parental responsibilities to the plaintiff and her family. Therefore, the defendant should retain the sole guardianship and custody of HAY, as it would best serve HAY's welfare and ensure stability in her care and upbringing. (paras 23 & 24)

(4) The initiation of Suit No. 1091 would inevitably lead to conflict. The ongoing litigation signified a significant degree of discord and unresolved issues between the said parties. The discord would likely intensify if the plaintiff and the defendant were required to share the guardianship and custody responsibilities of HAY. Such a contentious environment and possible future disputes would not be conducive for HAY's welfare and stability and would likely create a toxic environment for her. Constant exposure to conflict could lead to emotional distress and instability in HAY, impacting negatively on her mental and emotional development. Witnessing ongoing conflicts between guardians, could be emotionally harmful, leading to feelings of guilt, loyalty conflicts and a sense of being caught in the middle. HAY may internalise the hostility between her guardians, affecting her self-esteem and interpersonal relationships. The acrimony could result in vastly different parenting styles and values, leading to inconsistency in discipline, routines and expectations for HAY, thus confusing and creating additional stress for her. It was crucial to emphasise that joint guardianship and custody entail co-parenting, requiring open

A communication, compromise, and a focus on HAY's needs. The acrimony would impede constructive communication, making it difficult to make joint decisions regarding HAY's upbringing, education, healthcare and other important matters. (paras 27-30)

B **(5)** It was apparent that the plaintiff and her family felt entitled to dictate the terms of HAY's upbringing, largely due to their control over financial resources. However, control of financial assets should not be the decisive factor in determining eligibility for guardianship and custody. It was agreed that there was a very high likelihood of the plaintiff and her family unduly influencing HAY. Allowing such C influence would be inappropriate. It would be prudent to deny the plaintiff the access to HAY, to safeguard HAY's wellbeing and environment free from undue pressure. (paras 31, 32 & 36)

Obiter:

D **(1)** Although grandparents hold distinctive and valuable place within the family dynamics, and their wisdom, experience and unconditional love could often enrich the lives of their grandchildren in profounds ways, it is crucial to acknowledge their role is not intended to supplant those of parents, but rather to enhance and bolster it. While grandparents may E offer valuable guidance and advice, the autonomy and authority of the parents in respect of decision-making of their children, ought to be respected, particularly in situations where the parents and grandparents were at odds. This is crucial to ensure familial harmony was preserved and the needs and the wellbeing of the children remain paramount. (paras 34 & 35)

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Case(s) referred to:

Baheerathy Arumugam v. V Gunaselan V Visvanathan [2013] 1 CLJ 954 HC ***(refd)***
Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo [2002] 1 CLJ 721 CA ***(refd)***
Gan Koo Kea v. Gan Shiow Lih [2003] 4 CLJ 539 HC ***(refd)***
Mahabir Prasad v. Pushpa Mahabir Prasad [1981] CLJ 174B; [1981] CLJ (Rep) 182 HC G ***(refd)***
Sean O'Casey Patterson v. Chan Hoong Poh & Ors [2011] 3 CLJ 722 FC ***(refd)***
Tan Erh Ling v. Ong Khong Wooi [2021] CLJU 1325; [2021] 1 LNS 1325 HC ***(refd)***
Tan Sherry v. Soo Sheng Fatt [2016] CLJU 1586; [2016] 1 LNS 1586 HC ***(refd)***
Tan Siew Kee v. Chua Ah Boey [1987] CLJU 77; [1987] 1 LNS 77 ***(refd)***
Tay Bok Choon v. Tahansan Sdn Bhd [1987] CLJ Rep 24; [1987] 1 CLJ 441 PC ***(refd)***
H *Teh Eng Kim v. Yew Peng Siong [1977] CLJU 138; [1977] 1 LNS 138 FC* ***(refd)***

Legislation referred to:

Guardianship of Infants Act 1961, ss. 6, 11
Law Reform (Marriage and Divorce) Act 1976, s. 88(2)

I *For the plaintiff - Nicole Wee & Arthur Wang; M/s Arthur Wang, Lian & Assocs*
For the defendant - John Khoo; M/s Ismail Khoo & Assocs

Reported by Syamim Ariffin

JUDGMENT

Evrol Mariette Peters J:

Introduction

[1] This was the plaintiff's application ("this application") for joint guardianship, as well as joint custody, care, and control of the defendant's child. There was also a prayer by the plaintiff for access to, and physical custody, care, and control of the defendant's child ("the child").

[2] Given the privacy of the parties in this application, and sensitivity of issues in these proceedings, the plaintiff, the defendant, and the child have been anonymised respectively as HOM, HOP, and HAY.

The Factual Background

[3] The plaintiff is the maternal grandmother of the child, while the defendant is the father of the child, who was born in June 2010.

[4] The child's mother passed away in February 2020 ("the deceased mother"). The child is now the sole beneficiary of the deceased mother's estate, as well as the maternal grandfather's estate, which the mother had inherited. The maternal grandfather passed away in December 2019 ("the deceased grandfather").

[5] In March 2023, the defendant and the child filed an application, referenced as WA-24NCvC-1091-03/2023 ("Suit No. 1091"), against the plaintiff, the plaintiff's son ("the uncle"), and other parties. The uncle serves as the executor and trustee of the deceased mother's will, which is the central issue in Suit No. 1091. In Suit No. 1091, the defendant and child requested, among other things, an accounting of the deceased mother's estate. At the time of the hearing of this application, Suit No. 1091 was still pending in another court.

[6] In November 2023, the plaintiff filed this application.

The Issues

[7] The primary issue before the court was whether the plaintiff, as the grandmother of the child, should be granted joint guardianship, as well as joint custody, care, and control of the child, alongside the defendant. This determination required the court to carefully evaluate the dynamics between the parties involved, the child's needs, and the overall family situation.

[8] In addressing the main issue, the further issues were whether the deceased mother had appointed a guardian to the child, and whether the defendant was unfit as a parent to warrant this application.

[9] Additionally, the court had to decide if the plaintiff should be granted access to the child, considering the ongoing legal dispute in Suit No. 1091 initiated by the defendant and the child against the plaintiff, the uncle, and other parties. This involved weighing the potential impact of the plaintiff's involvement on the child's welfare and stability amidst the legal conflict.

[10] This application was dismissed for the following reasons.

Contentions, Evaluation, And Findings

Whether Deceased Mother Had Appointed A Guardian To The Child

[11] At the outset, it was crucial to remind the plaintiff and defendant ("the parties") that the starting point of this application was s. 6 of the Guardianship of Infants Act 1961 ("Guardianship of Infants Act"). This section stipulates that upon the death of a parent of an infant, the surviving parent, if any, shall, subject to the provisions of the Guardianship of Infants Act, become the guardian of the infant, either alone or jointly with any guardian appointed by the deceased parent. The relevant provision reads:

> Section 6 - Rights of surviving parent as to guardianship
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> On the death of a parent of an infant, **the surviving parent, if any, shall, subject to this Act, be guardian to the infant either alone or jointly with any guardian appointed by the deceased parent**, and – (a) if no guardian has been appointed by the deceased parent; or (b) in the event of the death or refusal to act of the guardian or guardians appointed by the deceased parent, **the court may, if it thinks fit, appoint a guardian to act jointly with the surviving parent**.
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> (emphasis added)

[12] It was undisputed that the deceased mother had never appointed a joint guardian to act alongside the defendant. In fact, a previous court order ("the court order"), obtained by the uncle through application No. PA-24NCvC-943-12/2020, explicitly recognised the defendant as the sole guardian of the child. The court order clarified that the defendant was entrusted with the exclusive rights and responsibilities of guardianship, without the involvement of any co-guardian. This prior legal determination underscored the defendant's sole authority over decisions regarding the child's welfare, care, and upbringing, thereby reinforcing the legal basis for the defendant's current guardianship status. This historical context was significant in the deliberation of this court on whether any changes to the guardianship arrangement, such as appointing the plaintiff as a joint guardian, would be appropriate or be in the best interest of the welfare of the child. Paragraph 3 of the court order states:

> 3. **bahawa penjaga yang sah kepada benefisiari Harta Pusaka Si Mati tersebut iaitu HOP sebagai Pemegang Amanah diberi kuasa yang sepenuhnya** termasuklah tetapi tidak terhad kepada kuasa-kuasa untuk memindahmilik (transfer), menyewa (rent), memajak (lease), menggadaikan (charge), melupuskan (dispose of) semua atau salah satu

> Hartanah Stonor tersebut DAN/ATAU Hartanah Reizz tersebut DAN/ ATAU Kenderaan tersebut dalam pegangan amanahnya demi kepentingan benefisiari kepada Harta Pusaka Si Mati tersebut.
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> (emphasis added)

[13] The court, therefore, had to determine if appointing a joint guardian alongside the defendant was necessary. The phrases "subject to this Act" and "if it thinks fit" in s. 6 of the Guardianship of Infants Act are indicative that the court must carefully consider the specific facts and circumstances of each case. This mandated a thorough application of the legal principles governing family proceedings, ensuring that any decision would serve in the best interest of the child's welfare. In doing so, the court needed to evaluate factors such as the child's current and future welfare, the relationship between the plaintiff and the child, the impact of a potential joint guardianship on the child's stability, and any relevant history of family dynamics and conflicts.

Consideration Of The Child's Welfare

[14] Prioritising the welfare of the child in the deliberations by the court acts as the "golden thread" woven throughout all proceedings. This requirement is enshrined not only in s. 11 of the Guardianship of Infants Act but also in s. 88(2) of the Law Reform (Marriage and Divorce) Act 1976 ("Law Reform (Marriage and Divorce) Act"), both of which read:

> **Guardianship of Infants Act 1961**
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> Section 11 - Matters to be considered
>
> The court or a Judge, in exercising the powers conferred by this Act, shall have regard primarily **to the welfare of the infan**t and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.
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> *****
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> **Law Reform (Marriage and Divorce) Act 1976**
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> Section 88 - Power of court to make order for custody (2) In deciding in whose custody a child should be placed **the paramount consideration shall be the welfare of the child** and subject to this the court shall have regard:
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> (emphasis added)

[15] At this juncture, it was crucial to develop a comprehensive understanding of the term "welfare of the child," as extensively referenced in numerous legal precedents, including *Teh Eng Kim v. Yew Peng Siong* [1977] CLJU 138; [1977] 1 LNS 138; [1977] 1 MLJ 234; *Mahabir Prasad v. Pushpa Mahabir Prasad* [1981] CLJ 174B; [1981] CLJ (Rep) 182; [1982] 1 MLJ 189; *Tan Sherry v. Soo Sheng Fatt* [2016] CLJU 1586; [2016] 1 LNS 1586; and *Tan Erh Ling v. Ong Khong Wooi* [2021] CLJU 1325; [2021] 1 LNS 1325.

[16] I was also guided by the Federal Court in *Sean O'Casey Patterson v. Chan Hoong Poh & Ors* [2011] 3 CLJ 722, which referenced the Singapore case of *Tan Siew Kee v. Chua Ah Boey* [1987] CLJU 77; [1987] 1 LNS 77. In that case, Chan Sek Keong JC (as he then was) elucidated the expression "welfare of the child" in the following passage:

> The expression 'welfare'... is to be taken in its widest sense. It means the general well-being of the child and all aspects of *his upbringing, religious, moral as well as physical. His happiness, comfort and security also go to make up his well-being. A loving parent with a stable home is conducive* to the attainment of such well-being. It is not to be measured in monetary terms.
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> (emphasis added)

[17] The Federal Court in *Sean O'Casey Patterson v. Chan Hoong Poh & Ors,* through the opinion of James Foong FCJ, proceeded to explain "welfare of the child" in the following passage:

> [53] According to *Halsbury's Laws of England,* 4th edn, reissue (Mackay edition), para 443 the term, "welfare principle" is a set of factors used when "a court determines any question with respect to the upbringing of a child or the administration of a child's property or the application of any income arising from it, the child's welfare must be the court's paramount consideration". In the English children Act 1989, under the heading 'welfare of the child' is a set of factors that must be taken into account when deciding on such cases. **These are for example: the wishes of the child; his feelings; his age; his sex and his background and the capabilities of the parties involved**. Thus, this term "welfare principle" relates to certain factors to be considered and their priority during deliberation in such cases.
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> (emphasis added)

[18] To reach a well-informed decision, the court had to meticulously examine the notion of "welfare of the child" in its broadest context, considering all pertinent factors and judiciously balancing them. Given the unique circumstances of each case, providing an exhaustive list of specific considerations is not feasible.

[19] The crux of the plaintiff's contention was that the child had been cared for by the plaintiff and her family, even when the deceased mother was alive. After the death of the deceased mother, the plaintiff claimed that she had continued to provide for the child financially and lavished the child with luxury. The plaintiff further asserted that the defendant had been an absent father, even during the deceased mother's lifetime.

[20] These averments were vehemently disputed by the defendant. As such, based on the cases of *Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo* [2002] 1 CLJ 721; [2002] 2 MLJ 97; [2002] 2 AMR 1527 and *Gan Koo Kea v. Gan Shiow Lih* [2003] 4 CLJ 539; [2003] 4 MLJ 770; [2003] 6 AMR 459, in light of conflicting versions that have not undergone the rigorous test of

cross-examination and re-examination, as would have been possible in a full trial with *viva voce* evidence, the court's duty was to disregard disputed facts and make a decision on undisputed facts.

[21] This crucial aspect of civil litigation practice has been eloquently summarised by Lord Templeman for the Privy Council in *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24; [1987] MLRA 68, [1987] 1 MLJ 433, in the following words:

> At the end of the day the judge must decide the petition on the evidence before him. *If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross examination, the judge must ignore the disputed allegations.* The judge must then decide the fate of the petition by consideration of the undisputed facts.
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> (emphasis added)

[22] Based on the affidavits and exhibits presented, there was no evidence indicating that the defendant was an unfit parent. On the contrary, the evidence demonstrated that the defendant had always been actively involved in the child's life. The records showed consistent care and engagement from the defendant, reinforcing his capability as a responsible parent.

[23] While it was acknowledged that the child had spent significant time with her grandparents, this arrangement occurred with the defendant's consent. The defendant had not objected to these visits, particularly because the deceased grandfather was very fond of the child. However, there was no evidence to suggest that the plaintiff and her family had ever taken on a substitute parental role for the defendant. Furthermore, it would be inequitable to hold the defendant's decision, to permit the child to spend time with her grandparents, against him. This decision was made out of consideration for the child's relationship with her deceased grandfather, and not as an abdication of parental responsibility.

[24] Given this context, it was clear that the defendant had maintained his primary role in the child's upbringing and had not relinquished his parental responsibilities to the plaintiff or her family. Thus, it was my view that the defendant should retain sole guardianship and custody of the child, as this would best serve the child's welfare and ensure stability in her care and upbringing.

[25] My decision was further bolstered by the fact that since both the defendant and the child had initiated Suit No. 1091 against the plaintiff and her family, granting guardianship and custody to the plaintiff, even on a joint basis, would inevitably lead to conflict.

[26] While several allegations were made by the defendant and the child in Suit No. 1091 against the plaintiff and her family, including claims of fraudulent transfer of the deceased mother's share to the uncle, and allegations regarding the uncle's sexual orientation, it was crucial to note that these issues were not before this court to address.

[27] However, the ongoing litigation signified a significant degree of discord and unresolved issues between the defendant and child on one hand, and the plaintiff and her family on the other. This discord would likely intensify if the plaintiff and defendant were required to share guardianship and custody responsibilities. Such a contentious environment would not be conducive to the child's welfare and could create an unstable and stressful situation for her. The evident acrimony between the plaintiff and defendant indicated future disputes, likely to create a toxic environment for the child.

[28] It was undisputed that constant exposure to conflict could lead to emotional distress and instability in the child, impacting her mental and emotional development negatively. Witnessing ongoing conflict between her guardians, if this application was allowed, could be emotionally harmful, leading to feelings of guilt, loyalty conflicts, and a sense of being caught in the middle. The child may also internalise the hostility between her guardians, affecting her self-esteem and interpersonal relationships.

[29] Such acrimony may also result in vastly different parenting styles and values, leading to inconsistency in discipline, routines, and expectations for the child. This lack of consistency could confuse the child and create additional stress.

[30] I was mindful that the plaintiff was requesting joint guardianship and custody with the defendant, rather than seeking sole guardianship or custody. However, it was crucial to emphasise that joint guardianship and custody entail co-parenting, requiring open communication, compromise, and a focus on the child's needs. In this case, the acrimony between the plaintiff and defendant would impede constructive communication, making it difficult to make joint decisions regarding the child's upbringing, education, healthcare, and other important matters. On this note, reference was made to the case of *Baheerathy Arumugam v. V Gunaselan V Visvanathan* [2013] 1 CLJ 954, where one of the reasons for granting sole guardianship, as well as sole custody, care, and control to one parent, was due to the acrimonious relationship between the parties.

[31] It was apparent that the plaintiff and her family felt entitled to dictate the terms of the child's upbringing, largely due to their control over financial resources. However, control of financial assets should not be the decisive factor in determining eligibility for guardianship and custody.

[32] Given this context, I had to agree with the defendant that there was a very high likelihood of the plaintiff and her family unduly influencing the child. In such circumstances, allowing this influence would be inappropriate. Therefore, I concluded that it would be prudent to deny even access to the child to the plaintiff, to safeguard the child's wellbeing and ensure an environment free from undue pressure.

[33] The defendant also brought to the court's attention the timing of this application, noting that it was filed nine months after the initiation of Suit No. 1091. This timing raised questions about the genuine intentions behind this application.

Concluding Remarks

[34] Grandparents undoubtedly hold a distinctive and valuable place within the family dynamics. Their wisdom, experience, and unconditional love often enrich the lives of their grandchildren in profound ways. However, it was crucial to acknowledge that their role is not intended to supplant that of parents but rather to complement and bolster it. They may step in as caregivers, particularly in situations where parents are unavailable due to work commitments, illness, or other responsibilities. Their support can be invaluable in easing the burdens of modern family life and providing a safe and nurturing environment for grandchildren to thrive.

[35] However, maintaining a delicate balance in the grandparent-grandchild relationship is essential. While grandparents may offer valuable guidance and advice, it is crucial to respect the autonomy of the parents and their authority in decision-making regarding their children, particularly in situations where parents and grandparents are at odds. This is crucial to ensure that familial harmony is preserved and that conflicts are minimised, fostering a supportive and cohesive family environment where the needs and wellbeing of the children remain paramount.

[36] In conclusion, after considering the aforementioned arguments and conducting a thorough examination of all the evidence presented to this court, encompassing both written and oral arguments from both parties, this application was dismissed with costs.